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UNCLAS SECTION 01 OF 04 SHANGHAI 000500

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USTR FOR CHINA OFFICE - AWINTER, TWINELAND, DKATZ, MCCOYS; IPR  
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DOC FOR NATIONAL COORDINATOR FOR IPR ENFORCEMENT - WPAUGH  
DOC FOR ITA/MAC: SZYMANSKI  
LOC/ COPYRIGHT OFFICE - STEPP  
USPTO FOR INT'L AFFAIRS - LBOLAND  
DOJ FOR CCIPS - TNEWBY  
FBI FOR LBRYANT  
DHS/ICE FOR IPR CENTER - DFAULCONER  
DHS/CBP FOR IPR RIGHTS BRANCH - GMCCRAY  
TREASURY FOR OASIA - DOHNER/CUSHMAN  
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SUBJECT: PTO-SPONSORED IP PROGRAM BUILDS BRIDGES IN EAST CHINA

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¶1. (SBU) Summary: During an October 16-17 U.S. Patent and Trademark Office-sponsored trip to Shanghai and Nanjing, Judge Ronald S.W. Lew from the United States District Court for the Central District of California and Matthew J. Bassiur, Criminal Division Trial Attorney and IP Liaison to Industry of the Computer Crime and Intellectual Property Section of the Department of Justice, met with a wide-range of IP officials and participated in a small media roundtable with representatives from the local press. The Shanghai High Court emphasized the breadth and depth of its ability to handle IP cases, with over half of its IP judges having received training overseas. Shanghai IP administrative officials stressed the benefits and effectiveness of the city's administrative enforcement, and the Shanghai Public Security Bureau (PSB) noted its efforts in tackling the increasing number and complexity of IP-related internet crimes. The Jiangsu IP Administration outlined a new local regulation allowing administrative officials to issue penalties for patent infringement, and the Jiangsu High Court discussed its increasing IP case load and engaged in a wide range of judicial topics. Since the filing of the IP-related WTO cases, meaningful dialogue with IP officials, especially outside Shanghai, has been sparse. The PTO-sponsored visit was invaluable in helping us re-establish engagement, particularly with the PSB and Jiangsu High Court. The Consulate would gladly welcome similar visits in the future. End Summary.

Shanghai High Court - Proud of its IP Enforcement  
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¶2. (SBU) During a meeting with the Shanghai High Court, Vice Director of the Intellectual Property Division Zhu Dan and two other judges from the civil and criminal divisions compared experiences with Judge Lew and Bassiur on IP-related cases. Zhu provided an overview of the IPR-related trial system in Shanghai Courts, noting there are 6 courts in Shanghai empowered to try IPR cases: the Shanghai High Court, 2 intermediate courts and 3 district-level courts in Pudong, Huangpu, and Yangpu. In total, there are 45 IPR judges in Shanghai, approximately half of whom received an education abroad and five who have a technical

background. Thus far in 2008, Shanghai courts have received more than 1,300 civil IPR cases and 70 criminal IPR cases. Foreign related cases accounted for more than 10 percent of the total. In comparing the two systems, Zhu noted that while more than 95 percent of IPR cases settled before trial in the United States, in Shanghai, the average rate of settlement before trial is 60 percent.

13. (SBU) Zhu further outlined how the Shanghai High Court allocates cases, particularly those involving several different causes of action. According to guidance from the Supreme People's Court, IPR tribunals should hear disputes on technical contracts, unfair-competition cases and anti-monopoly cases. Counterfeit pharmaceutical case, as well as those cases involving money laundering and fraud, automatically fall under the jurisdiction of a criminal tribunal. Zhu also pointed out that some IPR cases, which involve complex technical issues, are assigned to judges who have the relevant technical background.

14. (SBU) Regarding the issue of technical advice for IP-related cases, Zhu explained that complicated IP cases are handled through a "technical appraisal process." The parties in a case may choose, with mutual agreement, a third party to conduct the technical appraisal. The court will designate one if an agreement cannot be reached. In some cases, the court will appoint a technical expert as an assessor or consultant directly to the court.

15. (SBU) On the issue of damages, damages can be calculated under the Judicial Interpretation by the amount of infringing goods multiplied by the average profit of the rights holder, said Zhu. However, there is no clear guidance whether damages should be calculated based on retail price or wholesale price. According to Zhu, it depends on the specific case. If the producer is involved in counterfeiting, the wholesale price is generally applied. If a retailer is involved, the retail price

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is used as the instrument of measure. Regarding the price difference between legitimate goods and counterfeit goods, Zhu said if the rights holder makes a claim for damages, which is calculated based on his/her loss, the price of legitimate goods might be applied. But, if the rights holder makes a claim for damages, which is calculated on the infringer's profits, the price of the counterfeit goods might be utilized.

Shanghai PSB: Internet IP Crime on the Rise

16. (SBU) In a meeting with the Shanghai Public Security Bureau (PSB) Economic Crimes Investigation Division (ECID) Vice Director Tang Xiliang and six other officers, Judge Lew and Mr. Bassiur discussed both internal and international cooperation, resource allocation, and the rising number of IP-related internet crimes. Tang emphasized the importance of international cooperation on IPR crime investigations, especially on cases involving the internet. He was pleased with the degree of cooperation between China and the United States on transnational crimes, adding that the task force initiated between the Ministry of Public Security and the United States helped successfully resolve several crimes with a Shanghai component. According to Tang, the Shanghai PSB also plays an integral role in that city's implementation of the National IP Strategy, and has a unit under the leadership of Yao Jianda, which is solely dedicated to IP-related crimes. The Shanghai PSB also is dedicated to working closely with the municipality's IP administrative agencies to ensure effective cooperation.

17. (SBU) Tang acknowledged that the PSB's ECID does not have enough resources to effectively deal with every IP-related case. The PSB gives priority to and reserves resources for crimes involving terrorism and offenses that affect people's health and safety. In deciding which IP-related cases to investigate, the PSB must consider jurisdiction, the amount and value of goods involved, and the nature of those committing the crime, such as whether recidivists or members of organized crime are involved.

If there is a conflict over jurisdiction in a case, the Ministry of Public Security makes the final decision about the jurisdiction. The PSB also considers whether there is sufficient evidence to successfully prosecute the case.

¶18. (SBU) Tang also noted that his office is grappling with a rapidly increasing number and complexity of internet-related IP crimes. To develop a cadre of officers with the capacity to deal with internet-related IP crimes, Shanghai PSB has established special training programs and sent several Shanghai PSB officers abroad for training, including the United States. The ECID also works with the Shanghai Internet Supervision Department when special support is required. (Note: The Internet Supervision Department also is under the Shanghai PSB.)

#### Administrative Enforcement - Viable and Inexpensive

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¶19. (SBU) The Consul General hosted a lunch for Judge Lew and Mr. Bassiur. Chinese-Government guests included Vice Director of the Shanghai Administration of Industry and Commerce (SAIC) Chen Xuejun, Shanghai Copyright Bureau Copyright Department Director Wu Youzhang, and Vice Director of the Shanghai IP Administration Hong Yongqing. Each spoke on Shanghai's administrative enforcement system, the limits of administrative authority, and the administrative burden-of-proof issues compared to that of civil cases. Chen stressed that the SAIC regularly transfers counterfeit cases for criminal prosecution when there is a large volume involved and when the case has other "substantial implications." In addition, criminal and administrative authorities are empowered to undertake joint law-enforcement action. According to Hong, the Shanghai IP Administration annually handles about 40 patent-related cases. He also emphasized that, unlike the United States, China has administrative enforcement that allows a non-judicial option for rights holders to seek redress. Chinese rights holders complain

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that their only option in the United States is expensive litigation, while U.S. rights holders in China have access to "inexpensive" administrative enforcement. Chen also offered that a major reason why knock-offs continue to abound is due to foreign rights holders' inadequate supervision of markets.

¶10. (SBU) On copyright issues, Wu said that when the violation is severe enough, Copyright Bureau authorities have the right to seize equipment, such as copiers that produce the infringing material. They can also impose a fine up to RMB 100,000 (USD \$15,000), but this depends on the nature of the case as well as whether recidivism is involved. According to Wu, most copyright cases in Shanghai are ex officio; the Copyright Bureau regularly transfers cases to the PSB according to threshold regulations. Although the PSB has no direct access to administrative agencies' databases, the agencies willingly provide information, on request of the PSB.

#### Jiangsu IP Administration Continuing to Innovate

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¶11. (SBU) During a visit to the Jiangsu IP Administration, Department Director of Policy and Law Chen Suning provided an IP administrative enforcement overview of Jiangsu Province. In total, Jiangsu has administrative enforcement agencies for patents in 13 cities throughout the province. From 2002 through 2006, Jiangsu administrative enforcement agencies received more than 400 allegations involving patent infringement, of which 350 were closed. Of the 400 or so cases, 50 of them involved foreign rights holders from diverse locations, such as the United States, Japan, Germany, and Italy. Disputes over invention patents accounted for 15 percent of all cases. Chen said that the level of IPR protection has grown in direct proportion to local economic development. Like the cities of Beijing and Shanghai and Guangdong Province, Jiangsu also has a high number of IP cases because of its more advanced economy and active enforcement.

¶12. (SBU) Chen clarified that, under current law, patent administrative enforcement agencies only can order the infringer to cease the infringing activity. These agencies may not impose damages or levy fines against an infringer. If the rights holder demands compensation, he or she should file a civil case.

According to Chen, this is the reason why there are more patent cases handled in Jiangsu courts than through administrative enforcement procedures. However, the burden of proof in a civil case is much greater than that used for an administrative recourse. Generally, cases handled through administrative procedures are simple and obvious. Administrative cases are better suited towards those right holders who have difficulty collecting evidence and/or do not demand compensation. However, Chen said that Jiangsu hopes to improve patent protection, and is about to release a new local regulation entitled "Patent Promotion Regulation." According to the regulation, the Jiangsu IP Administration will have authority to issue fines for patent infringement, particularly for recidivist cases.

#### Jiangsu High Court - A Meeting of the Minds

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¶13. (SBU) During a five-hour discussion, President of Jiangsu High People's Court Gong Pixiang, Member of the Judicial Committee Liu Aizhen, Jiangsu High People's Court General Office Director Cai Shaogang, Presiding Judge of the IPR Division Song Jian, Presiding Judge of the Second Criminal Division Mao Zhonghua, and Deputy Presiding Judge of the IPR Division engaged Judge Lew and Mr. Bassiur on issues ranging from rule-of-law and transparency to defining damages and technical appraisals in IP cases. The Jiangsu High Court members freely exchanged views and queried Judge Lew on U.S. IP court cases, common procedures in U.S. District Courts, and intricacies of U.S. IP-related laws. Song gave an overview of Jiangsu's IP judicial efforts, saying there are 6 intermediate courts handling patent cases, and 9 basic-level courts handling IPR cases in province. From 2001 to 2008, Jiangsu courts received 7,070 IPR-related

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first-instance cases, which accounted for 10 percent of the nation's total first-instance IPR causes of action. Jiangsu closed 6,707 of these matters, or roughly 95 percent of its cases. During the same period, Jiangsu received 1,008 IPR-related second-instance cases, of which 979 were closed.

¶14. (SBU) Most infringement cases involved patents, trademarks, and copyrights; however, Jiangsu recently has begun to receive new types of cases, involving novel issues such as non-infringement declarations and temporary restraining orders. The majority of Jiangsu's IPR criminal cases involved trademarks. To better protect IP, the Jiangsu High Court emphasizes compelling the infringer to disclose all infringement information, imposing civil sanctions on infringers under certain circumstances, and inviting technical experts to be involved in cases. To increase transparency, the Jiangsu High Court now publishes all IP-related decisions on the internet. Separately, approximately 60 to 70 percent of all IP-related cases are settled before trial.

¶15. (SBU) Song also discussed the criteria that Jiangsu courts consider when issuing a temporary injunction, including the probability of the plaintiff prevailing in the case, the possibility of causing irreparable damage, the applicant's financial guaranty, and the public interest. Although it may be difficult to determine the factors constituting "irreparable damage," the court also factors in the loss of the right holder's market share that the infringer caused. Jiangsu courts issue temporary injunctions in about 80 percent of its IP-related cases. Song also explained that the court considers the stability of the patent right when issuing temporary restraining orders because utility-model and design patents are granted with little or no substantive examination.

¶16. (SBU) On the issue of defining damages, Song noted that Jiangsu uses a method similar to that used in Shanghai. If the

rights holder calculates damages based on his/her loss, the price of legitimate goods normally applies. If the rights holder calculates damages based on the amount of the infringer's profit, the price of counterfeit goods is used to determine fiscal harm.

#### Shanghai Press Outreach

¶17. (SBU) During an interview with three representatives of the local press, Judge Lew stressed the importance of the rule of law, and recognized that China has made tremendous strides in its IPR protection. He emphasized, however, that there must be increased focus on IP enforcement. The journalists asked a wide range of questions regarding Judge Lew's background as the first Chinese-American to be appointed to a Federal District Court judgeship. They also queried him regarding U.S. protection of Chinese IPR in the United States, and his views on the state of IP protection in China.

#### Comment

¶18. (SBU) Since the filing of the IP-related WTO cases, meaningful dialogue with IP officials, especially outside Shanghai, has been sparse. Judge Lew's and Matthew Bassiur's visit to this consular district has nudged the door open a bit wider for engagement. For example, despite multiple requests, this is the first meeting that the Shanghai PSB has accepted with the Consulate on IP issues in over two years of attempts. The dialogue with the Jiangsu High Court also was noteworthy for its open discussion, and IPR Attache Conrad Wong.

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